IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Dublin Division

IN RE: MORITZ DEVON HOLLOWAY Debtor	Chapter 7 Case Number 09-30446
TODD BOUDREAUX, CHAPTER 7 TRUSTEE Plaintiff v. MORITZ D. HOLLOWAY, D. DUSTON TAPLEY, JR., TIDAL WATER PROPERTIES, INC., INVERTED INC., JAY TAPLEY ROBERT L. JONES JR. and ALTAMAHA BANK & TRUST CO., Defendants	Adversary Proceeding Number 10-03015

ORDER

Before the Court are cross motions for summary judgment. First, D. Duston Tapley Jr. ("Tapley") and his son, Jay Tapley[1] (jointly "Tapleys") have moved for summary judgment arguing that due to the timing of the real estate transfers, they are entitled to summary judgment as to the 11 U.S.C. §§547, 548 and 549 claims. Conversely, the Chapter 7 Trustee, Todd Boudreaux ("Trustee") moves

[1] See Dckt. No. 154 where Jay Tapley concurs and agrees to the summary judgment motion filed by D. Duston Tapley, Jr.

for partial summary judgment as to his 11 U.S.C. §549 claim regarding purported post-petition transfers. These are core proceedings pursuant to 28 U.S.C. §157 and the Court has jurisdiction under 28 U.S.C. §1334. For the following reasons, the Tapleys' motion is granted as to §549 and denied as to §547 and §548 and the Trustee's motion is denied.

FACTS

While the facts of this case are convoluted, most are not in dispute. The main issue involved in these summary judgment motions is the date Moritz D. Holloway ("Debtor") legally transferred real estate title to Tapley, Inverted, Inc. and Tidal Water Properties, Inc. Inverted, Inc. and Tidal Water Properties, Inc. are owned and controlled by Jay Tapley. If these transfers do not fall within the reach back periods of 11 U.S.C. §547 and §548, or post-petition as contemplated by §549, they may not be avoided by the Trustee.

The controversy involves the estate of Charlie Sharpe, Sr. ("Sharpe") who died in the 1950s. Sharpe's will was written in the 1930s and acknowledged without specificity that he had made various gifts of land to some of his heirs during his lifetime. One of these gifts was purportedly to his son Arthur Sharpe and involves the property at issue in this case, namely a transfer of a purported 133 acres. There is no deed conveying the property from Sharpe to

Arthur Sharpe.

The first deed relevant to this case is where Arthur Sharpe conveyed the 133 acres to his niece, Eloise Deloach, by quit claim deed in 1978. In January 2005, Deloach filed a motion to allow late claim in the Sharpe probate matter. Dckt. No. 182, Ex. 3. In March 2005, the Probate Court of Montgomery County entered an order allowing Deloach to file a late claim. Dckt. No. 165, Ex. A. In 2007, this order was affirmed by the Superior Court of Montgomery County. Ex. B, Dckt. No. 165. In December 2005, while the matter was on appeal, Deloach conveyed the 133 acres to the Debtor, her nephew and Sharpe's grandson, and this deed was recorded in August 2006. Dckt. No. 1, Ex. A. Tapley is a lawyer and he represented Deloach in filing the motion to allow late claim and in settling the Sharpe's probate estate. Dckt. No. 113, Motion for Summary Judgment.

Also in August 2006, deeds transferring a one-third interest in 133 acres from the Debtor to Tapley, and a one-third interest in this same acreage from Debtor to Inverted, Inc. were recorded ("the 2006 Deeds"). The legal description to the 133 acres is as follows:

> All that tract or parcel of land situate, lying and being in the 275th District, G.M., Montgomery County, Georgia containing 133 acres, more or less, and bounded, now or formerly, as follows: On the North by lands of

> Isiah Blount; on the East by lands of the Charlie Sharpe Estate; on the South by lands of Carrie Sharpe Currie; and on the West by lands of Hack Chambers. Said tract of land is one of the same as referred to in the Will of Charlie H. Sharpe, Sr., recorded in Minute Book Number 10, pages 514-33, Montgomery County, Georgia Probate Court Records, being referred to as land already given to children in Item III thereof. See Deed Book 74, page 252, Montgomery County, Georgia Deed Records.

Dckt. No. 1, Exs. B. and C.

Thereafter in 2007, a survey was obtained purportedly of this same property and showed the acreage was actually 76.06 acres.

In January 2007, Debtor executed two deeds entitled "Corrected Warranty Deeds" where he purports to convey a one-half interest in 76.06 acres to Tapley and one-half interest to Inverted, Inc. in 76.06 acres. These Corrected Warranty Deeds were recorded March 18, 2009, more than two years after the execution date, and during the pendency of the Debtor's initial chapter 13 petition, and less than six months before Debtor filed his current bankruptcy petition. (Collectively, these Corrected Warranty Deeds are referred to as "the March 2009 Deeds"). The legal description used to describe the 76.06 acres is as follows:

> All that certain tract or parcel of land lying and being in the 275th G.M. District, Montgomery County, Georgia, consisting of 76.06 acres, and is more particularly described by a plat of survey from Long Pond Surveying dated June 28, 2006, recorded in Plat Book 9, page 141, Montgomery County Plat Records. Said

> tract is more particularly designated on said plat as Arthur Sharp 76.06 acres and is bounded on the North by lands of William Sharp; on the East by lands of Mattie Sharp and Estell Sharp Gillis; on the South by Parcel (3) Charlie Sharp, Sr. and [M]ary Ann Sharp Estate; and on the West by lands of Ronald W. Roberson. See Affidavit, Deed Book 220, page 413, Montgomery County Deed Records. See Deed Book 195, Page 260-261 Montgomery County Deed Records.

Dckt. No. 1, Ex. D.

Along with the March 2009 Deeds an affidavit from Debtor was recorded reciting both legal descriptions and providing:

> Said 133 acres as herein described and said 76.06 acres as herein described are the identical tracts of land and upon survey said 76.06 acres is the correct acreage on said 133 acres. This is part of the Charlie Sharpe, Sr. and Mary Ann Sharpe Estate.

Dckt. No. 1, Ex. I. The affidavit references that Debtor is the grandson of Charlie Sharpe, Sr. and Mary Ann Sharpe and is very familiar with the estate lands. Id. It further references all the deeds in the chain of title from Arthur Sharpe's conveyance to Eloise Deloach. Id. While the affidavit is undated, it is clear it was recorded on March 18, 2009. Dckt. No. 113, Exs. E and H.

The respective reach back periods extend to May 5, 2009 (90 days prior to the August 3, 2009 petition date) for the §547 action and to August 3, 2007 (two years prior to the August 3, 2009 petition date) for the §548 action.

The Tapleys assert various arguments. They argue they

obtained title outside the reach back periods when the 2006 Deeds were recorded in 2006. They argue that the issue of title from Sharpe to Arthur Sharpe was determined by the 2005 Montgomery County probate court order which allowed Deloach to file a late claim in the Sharpe probate matter. They also claim this property was not part of the Sharpe probate estate since Sharpe made an inter vivos gift to Arthur Sharpe. Alternatively, they contend the only conveyances within the reach back period are the March 2009 Deeds where Tapley and Inverted each purportedly received a one-half interest of Debtor's remaining one-third interest, namely a one-sixth interest. By affidavit, Debtor avers the 133 acres and the 76.06 acres are identical tracts. Dckt. No. 113, Ex. H. They argue the Debtor conveyed his remaining one-third interest to them via the March 2009 Deeds, but argue that title actually passed in 2007, the date the deeds were executed, not the 2009 recordation.

Conversely, the Trustee argues title to the 1,000 acres owned by Sharpe, including the property in question, remained unresolved until the Hon. H. Frederick Mullis, Jr., Superior Court Montgomery County, issued his June 15, 2009 order memorializing the settlement reached by a majority of Sharpe's heirs and ordering that "[Debtor] shall receive 76.06 acres designated 'Arthur Sharpe'" on the plat. (hereinafter, "June 2009 Mullis Order"). Dckt. No. 1, Ex. F, p. 5 ¶11). Interestingly, this order was prepared by Tapley,

as the attorney involved in resolving the estate issues. The June 2009 Mullis Order further provides for Tapley to prepare administrator deeds consistent with the terms of the order. Id. The June 2009 Mullis Order was subsequently amended on September 3, 2009 (the "September 2009 Order") to read "[Debtor] **or his assigns** shall receive 76.06 acres", presumably because the deeds from Debtor conveying his interest in the property had already been executed and recorded. Dckt. No. 1, Ex. H. (emphasis added to reflect the new language). Sharpe's Administrators executed an Administrators' Deed of Assent on July 23, 2009 conveying the 76.06 acres to Tidal Water Property, Inc., a company controlled by Jay Tapley. Dckt. No. 1, Ex. G, p. 1. ("Administrators' Deed"). This Administrators' Deed was executed and recorded in the real estate records approximately ten days before Debtor filed his current bankruptcy petition.

The Trustee argues that none of the deeds prior to the June 2009 Mullis Order transferred title in any property to Tapley or Inverted because Arthur Sharpe did not have title until the June 2009 Mullis Order. Furthermore, the Trustee argues the legal description of the 133 acres in the 2006 Deeds is legally insufficient to convey title to the 76.06 acres. The Trustee argues the legal description did not become legally sufficient and authorized until the June 2009 Mullis Order, which was within one year prior to Debtor's filing of this bankruptcy petition.

Alternatively, the Trustee argues the first time a legally sufficient description is even provided is in the March 2009 Deeds which are within the reach back period of §548 due to the date of recordation date.

The Tapleys argue the property in question was never part of the Sharpe probate estate as it passed inter vivos to Arthur Sharpe, and therefore the transfer of the one-third interest in 2006 conveyed good title to them and thus these conveyances fall outside of the reach back period. Notwithstanding the foregoing, the Court notes that Jay Tapley's Supplemental Answers to the Trustee's First Interrogatories were prepared by Malcolm F. Bryant, Jr., who according to the answer to the interrogatory was appointed as probate judge in this matter and he states that title was in doubt until the probate court order:

> Charlie Sharpe[] did not make written deeds for the gifts of land that he made to most of his children. He orally gave them land which they farmed and otherwise used over the years. Most of the title was established by adverse possession and later writings like the deed from Arthur Sharpe to Eloise DeLoach. The title to most of the property was in doubt until the probate court order. Malcolm F. Bryant, Jr., was appointed to serve as probate judge by the current probate judge and served in that capacity in the probate of the Charlie Sharpe Estate and the Mary Ann Sharpe Estate. He was appointed by the Probate Judge to [preside] in both cases.

Dckt. No. 139, Ex. A, p. 2 ¶¶16-17.

Debtor filed his prior chapter 13 case on March 2, 2009 which was dismissed on June 30, 2009. He then filed the current chapter 13 petition on August 3, 2009. The chapter 13 case was subsequently converted to chapter 7 on April 22, 2010 and the Trustee was appointed.

CONCLUSIONS OF LAW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c);[2] see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

> [A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (internal quotations omitted). "In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the

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[2] Pursuant to Federal Rule of Bankruptcy Procedure 7056, Rule 56 of the Federal Rules of Civil Procedure is applicable in bankruptcy adversary proceedings.

opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent." Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1107 (1986).

§547 Preference-Count One of the Complaint[3]

The Trustee seeks to avoid the July 23, 2009 transfer from the Administrators of the Charlie Sharpe, Sr. and Mary Ann Sharpe probate estates to Tidal Water Property, Inc. ("Administrators' Deed"), which Debtor by affidavit admits he assigned to Tidal Water Property, Inc. by instructing the Administrators of the Charlie Sharpe, Sr. and Mary Ann Sharpe to make a deed to Tidal Water Property, Inc. Dckt. No. 1, Ex. G, Deed and Dckt. No. 56, Ex. I-P.2, Affidavit. The Administrators' Deed was recorded on July 24, 2009 within the 90 day reach back period. The Tapleys argue they are entitled to summary judgment on this claim as the transfers of the 76.06 acres purportedly occurred outside the 90 day reach back period of 11 U.S.C. §547.[4] The Tapleys point to the dates of the

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[3] While this order is divided by the respective code sections, many of the arguments and analysis overlap and are not repeated in the separate sections. Nevertheless, it is my intent for the applicable analysis in one section to also apply in the other sections.

[4] 11 U.S.C. §547(b) states in pertinent part:

(b) Except as provided in subsections (c) and (i) of this

2006 Deeds conveying the one-third interest in the 133 acres which were executed and recorded more than two years before the August 3, 2009 petition date. The Tapleys further contend the March 2009 Deeds were executed on January 20, 2007, again more than two years before this bankruptcy was filed and therefore outside the reach back period of §547 and §548. Furthermore, they contend the March

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section, the trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made-

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

2009 Deeds were corrective deeds and therefore relate back to the original 2006 Deeds. Tapleys argue the June 2009 Mullis Order was unnecessary and done out of an abundance of caution. They contend Debtor had no remaining interest to transfer because he had already transferred his interest back in 2006. Alternatively, they argue even if the Court determines the March 2009 Deeds were not merely corrective deeds, at most, the Trustee can only reach back to the one-third interest Debtor retained after the 2006 Deeds. They argue the one half conveyance in the March 2009 Deeds was one half of the Debtor's retained one third interest, namely a conveyance of a one-sixth interest to Tapley and Inverted, Inc., respectively.

Conversely, the Trustee argues the 1978 deed to Deloach, the 2005 deed to Debtor, and the 2006 Deeds fail to transfer title because the legal description of the property is too vague. The Trustee offers the affidavit of Donald H. White, Esq., a real estate attorney ("White"), which states title to the property was not clear until the June 2009 Mullis Order. The Trustee also references the Bryant Interrogatory response stating title was unclear for the most part until the June 2009 Mullis Order was entered. Furthermore, the Trustee argues even assuming the legal description in the deeds was legally sufficient to transfer title, there is a break in the chain of title in the real estate records, because there is nothing in the real estate records showing the land legally passed from Sharpe to

Arthur Sharpe prior to the June 2009 Mullis Order. Accordingly, the Trustee argues the March 2009 Deeds are within the reach back period because of the recordation date.[5]

The Tapleys have alternative arguments. They contend the issue of title from Sharpe to Arthur Sharpe was determined in 2007 by the Superior Court's affirmation of the probate court's order. Ex. J. Dckt. No. 113. The Tapleys argue the June 2009 Mullis Order really was unnecessary, but was entered out of an abundance of caution to clear title. Furthermore, the Tapleys argue the doctrines of collateral estoppel and res judicata preclude the relitigation of the issue of title and prevents the Trustee from pursuing the transfers. At this stage of the proceedings, I disagree.

In Georgia,[6] for a judgment to have preclusive effect, the issue must have been actually litigated and that determination must be necessary to the judgment rendered. O.C.G.A. §9-12-40("A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in

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[5] As discussed in the subsequent §548 portion of this opinion, there also appears to be two separate chains of title. One into Tapley and Inverted, Inc. and one into Tidal Water Property, Inc.

[6] "The preclusive effect of a state court judgment in later litigation in a federal court is determined by the state's law." In re Turner, 2006 WL 6589867 *3 (Bankr. N.D. Ga. Sept. 21, 2006).

issue or which under the rules of law might have been put in issue in the case wherein the judgment was rendered until the judgment is reversed or set aside."); O.C.G.A. §24-4-42("A judgment shall be admissible between any parties to show the fact of the rendition thereof; between parties and privies it is conclusive as to the matter directly in issue, until reversed or set aside."); see, In re Turner, 2006 WL 6589867 *3 (Bankr. N.D. Ga. Sept. 21, 2006) citing Kent v. Kent, 452 S.E.2d 764, 766 (Ga. 1995) ("[C]ollateral estoppel applies where an issue of fact or law is actually litigated and determined by a valid judgment, and the determination is essential to the judgment. That determination is then conclusive in a subsequent action between the same parties."). Applying this to the facts of the current case, the Trustee is not collaterally estopped from pursuing his avoidance claims nor does the probate court order have res judicata effect on the matter at hand.

The probate court order did not establish title to the land; rather it allowed Deloach to file a claim late and then the Superior Court order affirmed the probate court's discretion to allow Deloach to make a claim. This is evident in the language of the Superior Court's subsequent order which states that whether or not the claim is proper is not what is at issue in allowing a late claim, it is whether it was an abuse of discretion. See Order, Dckt. No. 165, Ex. B. The Trustee posits and offers the June 2009

Mullis Order to show that it was not until the June 2009 Mullis Order was entered that the issue of title was finally resolved. The orders of the probate court and subsequent order affirming the probate court's ruling are binding orders as to the issue they decided, namely allowing the late claim. However, there is inconclusive proof of the validity of Deloach's claim. For these reasons, I find there is still a question of fact as to when title vested and therefore summary judgment at this point is inappropriate.

There also is insufficient evidence to establish title vested by adverse possession prior to the June 2009 Mullis Order. Tapleys offer the evidence of the deeds and the tax records to purportedly show Arthur Sharpe had title; however, given the facts of this case, this is insufficient evidence to establish title. See Nelms v. Venable, 33 S.E.2d 418, 421 (Ga. 1945)(tax records not enough to establish title to land). Therefore, at this point, the Tapleys have failed to show they are entitled to summary judgment on the §547 cause of action.

Furthermore, the Administrators' Deed to Tidal Water Property, Inc. was executed and recorded in July 2009, within §547's 90 day reach back period. The Georgia Supreme Court has stated that "[I]f a vendor conveys land by deed to his vendee before he has title himself, and afterwards the vendor acquires title, his

subsequent title inures to the benefit of the vendee, and a complete title is vested in the vendee the moment the vendor acquires it." Smith v. Laymon, 620 S.E.2d 796, 797 (Ga. 2005). In Smith, the court stated that the moment the trial court entered its order decreeing title to the larger tract in the vendor, then title to a portion of the tract described in the deed from vendor to the vendee vested. Id. Applying this principle to the current facts, the earliest title could have vested in Debtor, Tapley and Inverted, Inc. was June 2009 when the June 2009 Mullis Order was entered stating, "Devon[] Holloway shall receive 76.06 acres [designated] "Arthur Sharpe" on that plat recorded in Plat Book 9, page 141, Montgomery County, Georgia plat records. . . . Duston Tapley is directed to prepare administrator deeds consistent with this Order, to record said deeds and to pay recording costs from estate." Dckt. No. 1, Ex. F. The Administrators' Deed conveying title to Tidal Water Property, Inc. was recorded July 24, 2009. Therefore, it is possible that title vested within the 90 day reach back period of 11 U.S.C. §547.

Lastly, Tapley argues the property was never even part of Sharpe's probate estate, as he gave an inter vivos gift to Arthur Sharpe of the 133 acres. There is no question that there is no deed from Sharpe to Arthur Sharpe. A gift of land is subject to the Statute of Frauds. See O.C.G.A. §13-5-30 (any contract for sale of

land, or any interest in or concerning lands must be in writing). Furthermore, a will does not convey title. See O.C.G.A. §53-8-15 (title vests in personal representative until personal representative assents to title being vested in heirs or beneficiaries). The actions of Deloach in filing a claim in probate court and the subsequent orders appear to have placed the issue in the probate court. At this point, we do not have sufficient evidence of adverse possession to establish title vesting prior to the reach back periods. For these reasons, I find the Tapleys have not shown they are entitled to summary judgment as to Count One of the Trustee's complaint.

§548 Fraudulent Transfers-Count Two of the Complaint

Similarly, the Tapleys argue they are entitled to summary judgment as to Count Two of the complaint because they contend the transfers at issue all occurred in 2006 and 2007 beyond the two year reach back period of 11 U.S.C. §548.[7] As previously discussed, at

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[7] 11 U.S.C. §548 states in pertinent part:

> (a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily-

this point, there is insufficient evidence to determine as a matter of law that title passed to the Tapleys in 2006. Section 548 states in pertinent part:

> (d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

11 U.S.C. §548(d); Taylor v. Riverside-Franklin Properties, Inc. (In re Taylor), 228 B.R. 491, 498 (Bankr. M.D. Ga. 1998)(under §548(d) to determine when a transfer has occurred the court looks to state law to determine when no subsequent bona fide purchaser from the debtor can obtain a greater interest than the transferee). Under Georgia law, the deed must be recorded to be perfected against a bona fide purchaser for value so the date of recordation controls. See Suntrust Bank v. Equity Bank, S.S.B., 719 S.E.2d 539, 540 (Ga.

> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
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> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation

Ct. App. 2011) ("The filing and recordation of an instrument provides constructive notice to subsequent purchasers of the existence of a prior interest in the property."). The warranty deeds conveying 133 acres were recorded in 2006, outside the reach back period; however, as previously discussed, at this point, it is unclear whether Debtor had an interest to convey. There is a break in the chain of title as no deed from Sharpe to Arthur Sharpe is recorded. A deed made by a grantor with no apparent record title does not constitute constructive notice. 2 Pindar's Georgia Real Estate & Procedure §19-130 (6th ed. 2004). At this point, there is insufficient evidence of adverse possession. The late claim of Deloach was allowed but not yet resolved. Therefore, the records would show title to the land is unclear until at least the date the June 2009 Mullis Order was entered and therefore insufficient to defeat a subsequent bona fide purchaser from Debtor. See Aff. of White, Dckt. No. 139; Bryant Interrogatory, Dckt. No. 139, Ex. A, p. 2 ¶¶16. Furthermore, the 2006 Deeds were purportedly corrected by the March 2009 Deeds which were recorded in March 2009. The effective date of a corrective deed is the date it is recorded, it does not relate back to the execution date. See Green Rivers Forest, Inc. v. Aetna Life Ins. Co. (In re Green Rivers Forest, Inc.), 200 B.R. 956, 959-60 n. 9 (Bankr. M.D. Ga. 1996) (date of recording of corrective deed is effective date of corrective deed). The recording of the

corrective deeds is within the reach back period. There also is a question of what was actually transferred by the March 2009 Deeds. The Tapleys contend Debtor only transferred his remaining 1/3 interest to each of them, or rather a 1/6 to each. However, the Trustee argues the March 2009 Deeds actually replaced the prior deeds and reflect that the 1/3 interest to each was corrected to be a 1/2 interest given to each in the 76.06 acres.

Further evidence that title remained unclear until the June 2009 Mullis Order and the Administrators' Deed is that Debtor purportedly conveyed his full interest in this property to Tapley and Inverted Inc. no later than March 2009. There is no deed in the record from Tapley and Inverted Inc. to Tidal Water Property, Inc. Rather the June 2009 Mullis Order states Debtor shall receive title to the 76.06 acres. Then, the July 2009 Administrators' Deed conveys title to Tidal Water Property, Inc. In November 2009, Debtor files an affidavit stating he directed that his interest be transferred to Tidal Water Property, Inc. This reflects two chains of title for the same property. Because there are material facts in dispute, I find the Tapleys are not entitled to summary judgment as to Count Two of the complaint.

§549 Post-Petition Transfers-Count Three of the Complaint

Finally, the Trustee argues he is entitled to summary

judgment pursuant to 11 U.S.C. §549.[8] "To avoid a transfer under Section 549(a) a trustee need only demonstrate: (1) a post-petition transfer (2) of estate property (3) which was not authorized by the Bankruptcy Code or the court." In re Delco Oil, Inc., 599 F.3d 1255, 1258 (11th Cir. 2010). The Trustee seeks to avoid the post-petition transfer of property that occurred in September of 2009 when the June 2009 Mullis Order was amended to include "[Debtor] or his assigns" language. Relying on the affidavit of White, the Trustee argues that because there is no deed from Sharpe to Arthur Sharpe and the legal description of the property in the deeds conveying 133 acres is so vague, valid title to the land was not held by Tapley or Inverted, Inc. until entry of the September 2009 Order.

Even assuming the Trustee is correct that the prior 2006

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[8] 11 U.S.C. §549 states in pertinent part:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

and 2007 deeds did not convey title to Tapley and Inverted, Inc., there is not a post-petition transfer to avoid because the June 2009 Mullis Order and the Administrators' Deed were prior to commencement of the current bankruptcy case. As previously discussed, "[I]f a vendor conveys land by deed to his vendee before he has title himself, and afterwards the vendor acquires title, his subsequent title inures to the benefit of the vendee, and a complete title is vested in the vendee the moment the vendor acquires it." Smith v. Laymon, 620 S.E.2d at 797. Applying this principle to the facts of this case, when the June 2009 Mullis Order and the Administrators' Deed were entered decreeing title to the 76 acres in Debtor, title to the 76 acres vested in Tapley and Inverted, Inc. pre-petition. Therefore, there is no post-petition transfer to avoid as title vested prior to the petition date of the current case which was filed on August 3, 2009.

Furthermore, the fact that the June 2009 Mullis Order did not have the words "his successor or assigns" does not change this conclusion. See Dept. of Transp. v. Knight, 232 S.E.2d 72 (Ga. 1977)(stating that a deed conveyed fee simple interest and it did not matter that the grant was not both to successors and assigns); Featherston Mining Co. v. Young, 45 S.E. 414, 415 (Ga. 1903)("Under Civ. Code 1895, §3083, the words 'heirs,' 'assigns,' 'successors' are not necessary in order to convey the fee, or to make the estate

created by the instrument transmissible to subsequent purchasers."); Stinchcomb v. Clayton Co. Water Auth., 340 S.E.2d 217, 222 (Ga. Ct. App. 1986)(under O.C.G.A. §44-6-2 "the words 'heirs,' 'assigns,' 'successors,' are not necessary in order to convey the fee or to make the estate created by the instrument transmissible to subsequent purchasers."); 2 Pindar's Georgia Real Estate Law and Procedure §19-136 (6th ed. 2004)("[A] deed to a named person, without more, vests a fee simple estate; the addition of the words 'heirs and assigns' does not increase or diminish the estate conveyed.").

The Trustee further argues that even if title was established prior to the June 2009 Mullis Order, the March 2009 Deeds were recorded during the pendency of Debtor's prior chapter 13 case which was filed on March 2, 2009 and dismissed June 30, 2009, and therefore he is entitled to summary judgment as a matter of law. I disagree. Section 549(d) states:

> (d) An action or proceeding under this section may not be commenced after the earlier of-
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> (1) two years after the date of the transfer sought to be avoided; or
> (2) the time *the case* is closed or dismissed.

11 U.S.C. §549(d)(emphasis added). Section 549(a) allows the trustee to avoid a transfer of property of the estate that occurs after the commencement of *the case*. 11 U.S.C. §549(a)(emphasis

added). The Trustee's argument would have the Court read "the case" as referring to the prior case as used in §549(a), but place a different meaning on the term as pertaining to the current case as it is used in §549(d) so the action is not barred. However, the term "the case" as used in both §549(a) and (d) means the case in which the purported transfer occurred post-petition and in the matter sub judice "the case" in which any post-petition transfers occurred has been dismissed. Because the June 2009 Mullis Order was entered June 15, 2009, and the Administrators' Deed was recorded in July 2009, there is no post-petition transfer to avoid. The prior case was dismissed June 30, 2009, the current underlying case was filed August 3, 2009 and this adversary proceeding was commenced September 28, 2010, therefore, the Trustee cannot maintain the 11 U.S.C. §549(a) action as to the March 2009 Deeds as he is time barred pursuant to §549(d). For these reasons, I find the Trustee has not shown he is entitled to judgment as a matter of law and deny his motion for summary judgment as to Count Three of the complaint.

Conversely, for these same reasons, I find the Tapleys are entitled to summary judgment on the 11 U.S.C. §549 cause of action.

For the foregoing reasons, the Tapleys' motion for summary judgment is ORDERED DENIED as to Counts One and Two of the Complaint

and GRANTED as to Count Three. It is further ORDERED that the Trustee's motion for partial summary judgment as to Count Three of the Complaint is DENIED.

Susan D. Barrett

SUSAN D. BARRETT
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 30th Day of March 2012.